Supreme Court, U.S.
FILED
OCT 15 1997
CLERK

(2)

No. 97-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JUDITH A. FELTMANN,
Petitioner,

v.

SIEBEN, INC., d/b/a PLAZA MOTORS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUSAN NELL ROWE
(Counsel of Record)
THE STOLAR PARTNERSHIP
911 Washington Avenue, 7th Floor
St. Louis, Missouri 63101
(314) 231-2800

Counsel for Respondent

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

30 pp

QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

1. In order to withstand an employer's motion for summary judgment or judgment as a matter of law in a discrimination action, must a plaintiff only establish a *prima facie* case of discrimination along with pretext, as held by the Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits; establish a *prima facie* case along with pretext and proof that discrimination was the real reason for the employer's actions, as held by the First, Second, Fourth and Fifth Circuits; or must plaintiff provide direct evidence of discrimination, as held by the Eighth Circuit?

2. Whether the Eighth Circuit Court of Appeals erred by misapplying the standard for review, whereby the court should not reverse a jury verdict unless there is a complete absence of probative facts to support the conclusion reached, when it reversed the jury's verdict on all five counts?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW BY PETITIONER	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	2
A. The Circumstances Of Feltmann's Discharge	3
B. Sieben's Review Of Feltmann's Discharge	5
C. The Trial And Jury Verdicts	6
D. The Opinion Of The United States Court Of Appeals For The Eighth Circuit	7
SUMMARY OF ARGUMENT	8
REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI	10
A. The Eighth Circuit, Sitting *En Banc*, Has Held That A Submissible Case Has Been Made If A Plaintiff Adduces Evidence Of The Elements Of The *Prima Facie* Case, Together With Evidence Of Pretext	11

B. The Eighth Circuit Does Not Require Direct Evidence And The Court Did Not Require Feltmann To Adduce Direct Evidence 14

C. The Resolution Of The Conflict Among The Circuits Has No Bearing On The Outcome Of This Case 17

D. Feltmann Failed To Make A Submissible Case Of Discrimination 18

E. Feltmann's Retaliation Claim 22

F. Feltmann's Wrongful Discharge Claim 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Barber v. American Airlines, Inc., 791 F.2d 658 (8th Cir. 1986) 12

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 125 L.Ed.2d 168 (1993) 18,23

Davenport v. Riverview Gardens' Sch. Dist., 30 F.3d 940 (8th Cir. 1994) 16,21

Feltmann v. Sieben, 108 F.3d 970 (8th Cir. 1997) 1

Feltmann v. Sieben, No. 4:94CV562 SNL (E.D.Mo.) .. 1

Flast v. Cohen, 392 U.S. 83 (1968) 17

Haring v. Prosise, 462 U.S. 306 (1983) 23

Johnson v. Baptist Medical Center, 97 F.3d 1070 (8th Cir. 1996) 16

Lidge-Myrtil v. Deere & Co., 49 F.3d 1308 (8th Cir. 1995) 16,21

Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173 (8th Cir. 1992) 15,22

Nelson v. J.C.Penney Co., 75 F.3d 343 (8th Cir 1996) 16,17

Rothmeier v. Investment Advisors, 85 F.3d 1328 (8th Cir. 1996) 12,14,15

Ryther v. Kare 11, 108 F.3d 832 (8th Cir. 1997), *cert. denied*, 117 S.Ct. 2510 (1997) 7,8,10,11, 12,13,14,15,17,22

Sahara Coal Co. v. Fitts, 39 F.3d 781 (7th Cir. 1994).. 17

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 11,13

U.S. v. Johnston, 268 U.S. 220 (1925) 9,10,18

United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439 (1993).....9,10,17

United States v. Fruehauf, 365 U.S. 146 (1961) 17

Visser v. Packer Engineering Assoc., 924 F.2d 655 (7th Cir. 1991) 12,13

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 2

28 U.S.C. §1331 2

28 U.S.C. §2101(c)..... 1

Title VII, 42 U.S.C. §2000e, *et seq* 2

OTHER AUTHORITIES

Fed. R. App. P. 35(a)..... 11

S. Ct. R. 10 18

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Sieben, Inc., d/b/a Plaza Motors, respectfully requests that the Court deny the Petition for a Writ of Certiorari requested herein.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported as *Feltmann v. Sieben*, 108 F.3d 970 (8th Cir. 1997) and is attached to the Petition for a Writ of Certiorari as Appendix A. The Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on June 18, 1997. The order denying the Petition for Rehearing is not officially reported and is attached to the Petition for Writ of Certiorari as Appendix B.

The District Court's judgment in *Feltmann v. Sieben*, No. 4:94CV562 SNL (E.D.Mo.) was filed on April 12, 1995, and is not officially reported. A copy of that judgment is attached to the Petition for Writ of Certiorari as Appendix C. The district court's opinion regarding post-trial motions was filed on November 16, 1995, and is not officially reported. A copy of that opinion is attached to the Petition for Writ of Certiorari as Appendix D.

JURISDICTION

This Court has jurisdiction to review the order dated June 18, 1997 denying Feltmann's Petition for Rehearing and Suggestions for Rehearing en banc of the Court of Appeals for the Eighth Circuit by a Petition for a Writ of Certiorari filed on or about September 16, 1997, pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

The Court of Appeals for the Eighth Circuit had jurisdiction over this appeal from the judgment of the United States District

Court pursuant to 28 U.S.C. §1291. The District Court had jurisdiction of this claim of a violation of Title VII, 42 U.S.C. §2000e, *et seq.* pursuant to 28 U.S.C. §1331.

STATUTES INVOLVED IN THIS CASE

Title VII, 42 U.S.C. §2000e, *et seq.*, is set forth in the Petition for Writ of Certiorari at page 3.

STATEMENT OF THE CASE

Petitioner Judith A. Feltmann ("Feltmann") was discharged from her position as a commissioned car sales consultant with Respondent Sieben, Inc. ("Sieben"). Sieben owns and operates eight car franchises, all at the same location, in the St. Louis area. (T. 5-80). In 1989, Sieben opened an Infiniti franchise (hereinafter, Sieben's Infiniti franchise will be referred to as "Plaza Infiniti"). (T. 5:81). Bob Rich was hired to be the Sales Manager of Plaza Infiniti. (T. 5:82).

In September, 1991, Bob Rich hired Feltmann to be a commissioned sales consultant at Plaza Infiniti. (T. 2:53-54; 2:170; 3:59). As a commissioned sales consultant, Feltmann, along with four other sales consultants, was engaged in the selling and leasing of Infiniti automobiles. (T. 3:60).

In November, 1992, another employee informed Feltmann that Gordon Anzalone, a sales consultant in Sieben's Lexus showroom, had called her an extremely vulgar name. (T. 6:123-24).[1] On November 13, 1992, Feltmann wrote a letter to Rich about the comment. (T. 3:93-3:96; App. 1:181). Rich reported the comment to Tony Pandjiris, Sieben's General Manager. (T. 3:96). Feltmann ultimately met with John and Tom Capps, two of Sieben's owners, who told her to report any future incidents.

---

[1] The Lexus dealership is housed in a different building from Plaza Infiniti. and is managed by a different manager. (T. 4: 32, 5:105).

(T. 5:107, 6:254-55). They also asked Feltmann if she wanted Anzalone fired, but Feltmann said she did not. (T. 5:108). The Capps reprimanded Anzalone and informed him that if he ever used such language again, he would be discharged. (T. 5:108). Thereafter, Feltmann had no further problems with Anzalone. (T. 3:98, 4:34, 5:109).

On January 4, 1993, Rich sent Feltmann a personal memo regarding her "work ethic." (App. 1:106). Rich's memo indicated that he was unhappy with her method of selling. (App. 1:106). She was allowing "guest drives" - permitting prospective buyers to take an Infiniti without an accompanying consultant - too often and too soon in the selling process. (App. 1:106). At about the same time, Rich spoke with Rick Beutel, a male sales consultant, about deficiencies in his selling methods. (T. 2:84).

In January and February, business continued to decline at Plaza Infiniti. (T. 2:201). Rich experienced pressure from his management to improve business. (T. 2:201-02). On or about March 3, 1993, Rich established sales goals for all of the sales consultants and informed Feltmann and Rick Beutel that if they did not make the goals, they would be discharged. (App. 1:109-10; T. 2:99-100, 2:201-03). Feltmann and Beutel each received a memorandum informing them that they had been placed on probation. (App. 1:109; T. 2:99-2:100, 2:249-51). Feltmann and Beutel rebounded by the end of the month.

A. The Circumstances Of Feltmann's Discharge

Plaza Infiniti had a practice of permitting a potential customer to take an automobile, overnight or for the weekend, without an accompanying sales consultant. (T. 2:53). Prior to April, 1993, Rich permitted his sales consultants to use their own discretion in determining when a potential customer could take a car in this fashion. (T. 2:139-2:141). The sales consultant was to record the

car in the "guest drive" log, a log kept so that Rich would at all times know where the inventory was. (T. 2:147-48, 3:40-41, 3:124-25, 3:159).

In April, 1993, Rich announced a new guest drive policy. (T. 2:139-41, 2:149). Rich provided all sales consultants with a memorandum, informing them that overnight guest drives would no longer be permitted without Rich's permission, and that the sales consultants had to accompany all customers on a guest drive. (App. 1:114; T. 2:136-41, 2:208, 6:90).

In April, 1993, Plaza Infiniti received its first shipment of the new model of Infiniti, the 94 Q45. (T. 2:208-09, 6:228-29). On the weekend of May 15, 1993, Rich went to Chicago. (T. 6:90). Prior to going to Chicago, he gave instructions to all of the sales consultants that no one was to give one of the 94 Q45s to a customer for a guest drive without accompanying the customer. (T. 2:210-11, 6:90, 6:228-29).

On Saturday, May 15, 1993, while Rich was in Chicago, Feltmann permitted a customer to guest drive the 94 Q45 from 10:30 a.m. to 4:00 p.m. without accompanying the customer. (T. 3:195-97). In addition, Feltmann failed to record the car on the guest drive log so that Rich would not know that she had put the car on guest drive in violation of his instructions. (T. 3:231-32). In addition, over that weekend, Feltmann allowed another customer to take a J30T for an overnight guest drive, without obtaining Rich's permission. (T. 3:199, 3:230-31). This action violated the directive of the April 9, 1993 guest drive memorandum. (T. 2:211-12). Again, Feltmann failed to record this car on the guest drive log in an attempt to hide her actions from Rich. (T. 3:231-32).

When Rich learned of these incidents, Rich concluded that Feltmann had disobeyed his direct instructions with respect to

the 94 Q45 and the J30T.[2] (T. 2:211-12, 6:90-92). Rich also concluded that she had failed to record the cars on the guest drive log because she was trying to deceive him. (T. 2:211-12, 6:90-91). As a result, Rich discharged Feltmann on May 17, 1993, upon his return from Chicago. (T. 6:90-6:91).

B. Sieben's Review Of Feltmann's Discharge

On May 17, 1993, the day that Rich informed Feltmann of her termination, Feltmann asked for a review of her discharge, claiming that she had been discriminated against. (T. 4:154-55, 5:112, 6:258; App. 1:125). On May 18, 1993, Feltmann met with Rich, Tony Pandjiris, the General Manager of Plaza Motors, and John and Tom Capps, and informed them that she thought that she had been discriminated against. (T. 4:56, 5:113-16, 6:258-9). Feltmann also asked for her job back. (T. 4:154-55, 5:117-18).

The Capps investigated her complaints, but they found no merit in her allegations. (T. 5:118-19, 6:261-62). John Capps, however, believed that Feltmann was a "salvageable employee," and he directed Tony Pandjiris to extend an offer of reinstatement to Feltmann. (App. 1:116-17; T. 4:156, T. 5:23-25, T. 5:119-20, T. 6:91-92, T. 6:266-67). Pandjiris extended the offer of reinstatement, but Feltmann declined the offer because Sieben refused her demand that Sieben fire four other employees, did not afford her complaints any merit, and would not make any changes in the showroom. (T. 6:262-63). Tom Capps also asked her whether she would be interested in a job in another showroom. (T. 6:262-64). Feltmann told him that she did not believe that she would have the same opportunities in another showroom that she had at Plaza Infiniti. (T. 6:263-64).

---

[2] Rich believed that Feltmann had violated the April 9 memorandum by allowing Quinn to take the J30T on an overnight guest drive. (T. 6:90, 2:211-12).

C. The Trial And Jury Verdicts

Feltmann's Complaint alleged that she was discharged in violation of Title VII, 42 U.S.C. §2000e *et seq.*, the Missouri Human Rights Act ("MHRA"), Mo.Rev.Stat. §213.010 *et seq.*, and the Missouri common law.[3] Feltmann adduced no evidence of any comments that had been made by Rich, or any of the decision-makers, that would indicate gender bias and she adduced no comments indicative of retaliatory animus. Instead, Feltmann's evidence was directed to an attempt to demonstrate that she had been treated differently from the other employees of Plaza Infiniti.

The jury found in favor of Feltmann on all of the claims that she submitted to the jury: 1) sex discrimination in violation of Title VII, 2) retaliation in violation of Title VII, 3) sex discrimination in violation of the MHRA, 4) retaliation in violation of the MHRA, and 5) wrongful discharge. The jury awarded Feltmann the sum of $112,661.00 for back pay, $20,072.29 for compensatory damages, and $25,000.00 in punitive damages on her Title VII sex discrimination claim. (App. 1:43). The district court overruled Sieben's Motion for Judgment as a Matter of Law, or in the Alternative, Motion for a New Trial, or in the Alternative, to Alter or Amend the Judgment. (App. 1:45A, 2:177).

Thereafter, the District Court held a hearing on the equitable issues. In its Order of November 16, 1995, the District Court awarded front pay for a two year period in the total amount of

---

[3] Feltmann alleged a claim of wrongful discharge under the Missouri common law. However, Feltmann primarily argues that the Petition should be granted so that this Court can review certain Title VII issues. Although she includes a discussion of the evidence that she believes supports her state law claims, this argument is simply a peripheral argument. Moreover, as set forth, *infra*, a review of the sufficiency of evidence on a common law claim is not a matter for this Court's review. Accordingly, Sieben has not set forth the evidence relevant to the common law claims.

$72,668.38, attorneys' fees in the amount of $153,388.45 and costs in the amount of $14,251.87. (App. 1:47). In this Order, the District Court denied Sieben's Motion for a Judgment as a Matter of Law, or in the Alternative, for a New Trial, or in the Alternative, for Remittitur. (App. 1:47). Thereafter, on November 22, 1995, Sieben filed a timely Notice of Appeal of the judgments of the District Court. (App. 1:53).

D. The Opinion Of The United States Court Of Appeals For The Eighth Circuit

The United States Court of Appeals for the Eighth Circuit reversed the judgment of the District Court and entered judgment with respect to Sieben on all of Feltmann's claims. The Court conducted a *de novo* review of the district court's denial of the judgment as a matter of law. (Petitioner's Appendix, 7a, hereinafter referred to as "Pt.App. "). The Court reviewed each item of evidence that Feltmann presented of disparate treatment and concluded either that the employees cited were not "similarly situated" to Feltmann or that she had failed to provide specific evidence to substantiate the "vague and conclusory claims." (Pt.App., pp. 7a-11a).

Citing the *en banc* opinion of *Rythers v. Kare 11*, 108 F.3d 832 (8th Cir. 1997), *cert. denied*, 117 S.Ct. 2510 (1997), the Court held:

> We recognize that a jury may discredit or disbelieve whatever alleged facts are inconsistent with its conclusion, including the employer's proffered reason for the plaintiff's discharge, as long as evidence supports the jury's verdict. *See Lavender v. Kurn*, 327 U.S. 645, 653 (1946), *quoted in Ryther*, slip. op. at 27. As this statement presupposes, however, sufficient evidence must still exist to form a basis upon which a reasonable jury could rest its conclusion that the employer's decision stemmed from intentional discrimination. *See*, *Ryther*, slip. op. at 8-10, 25. Because

> there was an absence of such evidence, the district court should have granted Sieben's motion for JAML on Feltmann's discrimination claims.

(Pt.App., p. 11a). Similarly, the Court found that Feltmann had failed to adduce sufficient evidence of disparate treatment to make a submissible case with respect to her retaliation claims. (Pt.App., pp. 11a-12a).

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eighth Circuit has never held that a plaintiff may make a submissible case only by proving direct evidence of discrimination. In the instant case, the Court did not require Feltmann to adduce direct evidence of discrimination.

The United States Court of Appeals for the Eighth Circuit, sitting *en banc*, has specifically acknowledged that a plaintiff may make a submissible case by adducing evidence of pretext. *Rythe*r *v. Kare 11*, 108 F.3d 832, 837 (8th Cir. 1997)(en banc). The Court further held that in certain classes of cases, simply proving pretext is insufficient if the evidence of pretext, standing alone, is inconsistent with a finding of discrimination. (*Id.*) In the instant case, the Court relied upon the *en banc* decision in *Rythe*r, and held that on the evidence adduced, Feltmann had failed to make a submissible case.

Feltmann claims that this Court should grant the Petition for a Writ of Certiorari because she claims that there is a conflict in the circuit courts with some courts holding that a plaintiff makes a submissible case merely by adducing evidence of pretext ("pretext only" circuits), while other circuit courts require a plaintiff to meet a higher standard of proof by adducing additional evidence of discrimination ("pretext-plus" circuits). However, Feltmann's claims were decided under the *Rythe*r standard, a standard that specifically recognizes that pretext is sufficient. The Eighth Circuit held that Feltmann's claims failed under the

lower standard. Accordingly, even if the higher standard of "pretext-plus" is the appropriate standard, Feltmann's claims fail. Thus, the resolution of any conflict among the circuits has no bearing on the outcome of this case. Any decision by this Court regarding the appropriate standard of proof would be an advisory opinion. Inasmuch as this Court lacks the power to issue advisory opinions, the Petition for Writ of Certiorari should be denied. *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439; 113 S.Ct. 2173, 2178 (1993).

In Point II, Feltmann claims that the United States Court of Appeals for the Eighth Circuit used the wrong standard in reviewing the evidence to determine whether Feltmann made a submissible case. To the contrary, the Court used the correct standard and correctly concluded that Feltmann failed to make a submissible case. Any mistake in the application of the law to the evidence in the case is not an appropriate basis for the grant of a writ of certiorari. *U.S. v. Johnston*, 268 U.S. 220, 227 (1925).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

The Eighth Circuit has never held that a plaintiff in a discrimination case must adduce direct evidence in order to make a submissible case, and the Eighth Circuit did not hold that Feltmann had to adduce direct evidence in order to make a submissible case. In *Ryther v. Kare 11*, 108 F.3d 832 (8th Cir. 1997) (*en banc*), *cert. denied*, 117 S.Ct. 2510 (1997), the Eighth Circuit, sitting *en banc*, held that the elements of the *prima facie* case, together with evidence of pretext, are sufficient for a plaintiff to make a submissible case. (*Id.* at 837). The Court held that in certain cases, evidence of pretext, is insufficient if the evidence of pretext is inconsistent with a finding of discrimination. (*Id.*)

In the instant case, the Court relied on its holding in *Ryther*, and determined that Feltmann had failed to make a submissible case. To the extent that there may be a conflict among the circuits with some circuits requiring "pretext only," and other circuits requiring the higher standard of "pretext plus," the resolution of the conflict has no bearing on the instant case because Feltmann's claims fail under a standard that specifically recognizes that pretext alone is sufficient. Thus, the Petition for a Writ of Certiorari is simply a request that this Court enter an impermissible advisory opinion. *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439; 113 S.Ct. 2173, 2178 (1993).

In Point II, Feltmann requests that this Court grant a Writ of Certiorari to review the evidence to determine whether the Court of Appeals was correct in its holding that Feltmann failed to make a submissible case. Certiorari is not granted to review evidence or discuss specific facts. *U.S. v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.).

A. The Eighth Circuit, Sitting *En Banc*, Has Held That A Submissible Case Has Been Made If A Plaintiff Adduces Evidence Of The Elements Of The *Prima Facie* Case, Together With Evidence Of Pretext

Although Feltmann asserts that the Eighth Circuit has been inconsistent in its rulings on the issue, Feltmann omits any discussion of the Court's *en banc* opinion in *Ryther v. Kare 11*, 108 F.3d 832 (8th Cir. 1997) (*en banc*), *cert. denied*, 117 S.Ct. 2510 (1997).[4] In *Ryther*, the Court set forth the role of pretext evidence in light of its understanding of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). With the exception of the instant case, all of the opinions of the Eighth Circuit that Feltmann cites as examples of inconsistent opinions were decided prior to *Ryther*. Any conflicts that existed within the Eighth Circuit prior to *Ryther* are irrelevant in light of the *en banc* decision in *Ryther*. Moreover, any conflicts within the Eighth Circuit are the subject for *en banc* hearing by the Eighth Circuit, not for review by a Writ of Certiorari in this Court. *See*, Fed. R. App. P. 35(a).

In *Ryther*, the Eighth Circuit engaged in *en banc* review "for the sake of guidance to the bar and district courts . . . to unify and clarify [the Court's] understanding of the Supreme Court's standard." (*Id.* at 836.) The Court set forth the standard as follows:

> . . . when the employer produces a nondiscriminatory reason for its actions, the prima facie case no longer creates a legal presumption of unlawful discrimination. *The elements of the prima facie case remain, however, and if they*

---

[4] Although there were concurring and dissenting opinions in *Ryther*, eight of the eleven active judges on the Eighth Circuit joined in Point II of the opinion of the Court, the portion of the opinion in which the Court specifically held that evidence of the *prima facie* case, coupled with pretext, is sufficient to support a jury verdict.

> *are accompanied by evidence of pretext and disbelief of the employer's explanation, they may permit the jury to find for the plaintiff.* This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of . . . discrimination.

Ryther, supra, 108 F.3d at 837 (emphasis supplied). Thus, the Court specifically held that a plaintiff who adduced evidence of a *prima facie* case, along with evidence of pretext, could make a submissible case. The Court went on to hold that in certain kinds of cases, proving pretext is not enough if the evidence is inconsistent with a finding of discrimination. In elucidating the circumstances in which pretext evidence is inconsistent with a finding of discrimination, the Court cited three cases: *Rothmeier v. Investment Advisors*, 85 F.3d 1328 (8th Cir. 1996); *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986); and *Visser v. Packer Engineering Assoc.*, 924 F.2d 655 (7th Cir. 1991).

In *Rothmeier*, the plaintiff adduced evidence of pretext by adducing evidence that he was discharged because he confronted his employer about securities violations. Thus, even though he adduced evidence of pretext, that evidence was inconsistent with a finding of discrimination.

In *Barber*, the plaintiffs adduced evidence that plaintiff had been treated differently from others within the protected class who had been treated more favorably. Again, any evidence of pretext was inconsistent with a finding of discrimination because other individuals in the protected class had been treated more favorably than the plaintiff. Thus, as the Court noted, "the evidence of pretext did not support a reasonable inference of . . . discrimination." *Ryther*, 108 F.3d 832, 837 n. 4 (8th Cir. 1997).

In *Visser*, the district court entered judgment in favor of the plaintiff, on an age discrimination claim, because it held that the employer's actions violated the norms of corporate conduct. 924 F.2d at 657. The plaintiff conceded that he was discharged because he was disloyal to the chief executive officer. The United States Court of Appeals for the Seventh Circuit reversed the judgment, and held that if the employee was fired for disloyalty, which he conceded, such a finding was inconsistent with a finding of age discrimination. (*Id.*) Thus, in the cases cited in *Ryther*, the plaintiff's pretext evidence was inconsistent with a finding of discrimination.

The *Ryther* opinion is consistent with this Court's opinion in *Hicks*. In *Hicks*, the district court found that the employer's explanation was false but also held that the plaintiff had failed to prove that the employer's conduct was racially rather than personally motivated. The district court entered judgment in favor of the employer. The United States Court of Appeals for the Eighth Circuit reversed, holding that once the fact-finder determined that the proffered reason was false, the plaintiff was entitled to a directed verdict in his favor.

In reversing the appellate court, this Court held that proof that the articulated reason is false, standing alone, does not entitle the plaintiff to judgment. Pretext evidence may be enough to sustain a verdict for the plaintiff. However, the pretext evidence must be sufficient to demonstrate that the employer intentionally discriminated against the employee.[5] 509 U.S. at 515, 113 S.Ct. at 2752. To meet this burden, the plaintiff does not have to adduce *additional* evidence of discrimination. As this Court held,

---

[5] This Court noted that after the defendant has satisfied its burden of adducing a non-discriminatory reason for the employment action, the burden created by the prima facie case drops from the case and is no longer relevant. At this stage, i.e., the pretext stage, the trier of fact proceeds to the ultimate question: whether the employee has proven that the employer intentionally discriminated against the employee. 509 U.S. at 510-11, 113 S.Ct. at 2749

"rejection of the employer's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . and upon such rejection, 'no additional proof of discrimination is *required*.'" 509 U.S. at 510-11. The Court noted that "[e]ven though . . . rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination*." 509 U.S. at 511 n. 4. Thus, this Court recognized that there may be some cases in which the overall strength of the *prima facie* case, along with evidence of pretext, will be sufficient, while in other cases such evidence will not be sufficient. In all cases, the evidence must be sufficient for a reasonable fact-finder to conclude that the defendant has discriminated against the plaintiff. *See*, *Rothmeier*, *supra*, 85 F.3d at 1334-35.

In *Ryther*, the Eighth Circuit noted that in some cases, the *prima facie* case, along with the evidence of pretext, is sufficient for the jury to return a verdict for the plaintiff. 108 F.3d at 837. In addition, recognizing that the plaintiff must adduce sufficient evidence for a reasonable fact-finder to conclude that the employer discriminated against the plaintiff, the Court held that where the evidence is inconsistent with a finding of discrimination, the plaintiff has failed to make a submissible case.

B. The Eighth Circuit Does Not Require Direct Evidence And The Court Did Not Require Feltmann To Adduce Direct Evidence

In the instant case, the Court conducted a thorough review of Feltmann's evidence in an attempt to find some evidence to support the jury's verdicts. In its holding, the Court cited and relied on *Ryther*. The Court specifically acknowledged that in some cases, evidence of pretext might be sufficient. The Court stated:

> [w]e recognize that a jury may discredit or disbelieve whatever alleged facts are inconsistent with its conclusion,

> including the employer's proffered reason for the plaintiff's discharge, as long as evidence supports the jury's verdict. *See Lavender v. Kurn*, 327 U.S. 645, 653 (1946), *quoted in Rythe*r, slip. op. at 27. As this statement presupposes, however, sufficient evidence must still exist to form a basis upon which a reasonable jury could rest its conclusion that the employer's decision stemmed from intentional discrimination. *See*, *Rythe*r, slip. op. at 8-10, 25.

(Pt.App., p. 11a). As the foregoing passage demonstrates, in the instant case, the Eighth Circuit correctly stated the law as set forth by the Eighth Circuit in *Rythe*r. The Eighth Circuit held, as discussed *infra*, that there was a complete lack of evidence supporting Feltmann's claims.

Feltmann claims that the Court required her to adduce direct evidence of discrimination and appears to suggest that this is the law of the Eighth Circuit. To the contrary, the Eighth Circuit has never held that a plaintiff, in a case that does not involve a reduction in force, must adduce direct evidence to make a submissible case.[6] The Eighth Circuit has specifically held that a plaintiff may adduce either direct or circumstantial evidence. *See*, *Rythe*r, *supra*, 108 F.3d at 836; *Rothmeier*, *supra*, 85 F.3d at 1331; *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174 (8th Cir. 1992).

Contrary to Feltmann's assertions, the Eighth Circuit neither held nor suggested that Feltmann could make a submissible case only by adducing direct evidence. Feltmann adduced no evidence that any decision-maker ever made any discriminatory remarks. Thus, Feltmann had to proceed under the circumstantial evidence test of *Burdine*, and the Court analyzed her claims under the *Burdine* case. (Pt.App., pp. 7, 10-11). In order to prove

---

[6] The Eighth Circuit does require direct evidence in some reduction in force cases. *Rythe*r, *supra*, 108 F.3d at 836 n.1.

her case, Feltmann had to prove pretext. Feltmann attempted to prove pretext by showing that she had been treated differently from male employees. The Court correctly observed that Feltmann had to adduce evidence of comments or conduct by the decision-maker reflective of a discriminatory attitude. (Pt.App, p. 8a). The remaining portions of the Opinion demonstrate that this statement does not mean that Feltmann had to adduce direct evidence. In discussing Feltmann's differential treatment evidence, the Court cited and relied on a number of cases in the Eighth Circuit where evidence of disparate treatment was used to prove pretext.[7] The Eighth Circuit's citation to these cases demonstrates that it reviewed Feltmann's evidence of alleged disparate treatment to determine whether she had adduced evidence of pretext.

Feltmann also claims that the Court erred in relying on *Nelson v. J.C.Penney Co.*, 75 F.3d 343 (8th Cir. 1996). Feltmann asserts that *Nelson* held that a plaintiff must adduce direct evidence of discrimination in order to make a submissible case. To the contrary, in *Nelson*, the Eighth Circuit specifically noted that in some cases, a plaintiff can make a submissible case by proving pretext. (*Id.* at 346). The Court stated, "[w]e have said that in 'some cases, evidence that an employer's proffered non-discriminatory explanation is wholly without merit or obviously contrived might serve double duty, . . . permitting an inference that . . . discrimination was a motivating factor in a plaintiff's termination. . . . '" Thus, *Nelson* does not hold that a plaintiff must adduce *direct* evidence of discrimination. Moreover, even

---

[7] The Court cited three cases in its discussion of Feltmann's evidence of disparate treatment: *Johnson v. Baptist Medical Center*, 97 F.3d 1070, 1073 (8th Cir. 1996); *Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1312 (8th Cir. 1995); and *Davenport v. Riverview Gardens' Sch. Dist.*, 30 F.3d 940, 945 (8th Cir. 1994). (Pt. App. pp. 9a-10a). In all of these cases, disparate treatment evidence was considered pretext evidence. *Johnson*, *supra*, 97 F.3d at 1073; *Lidge-Myrtil*, *supra*, 49 F.3d at 1311; *Davenport*, *supra*, 30 F.3d at 945.

if *Nelson* held that a plaintiff had to adduce direct evidence, that holding would no longer be valid in light of the Court's *en banc* ruling in *Rythe*r.

C. The Resolution Of The Conflict Among The Circuits Has No Bearing On The Outcome Of This Case

Feltmann asks this Court to issue its writ of certiorari to correct the conflict in the circuits between those courts that require "pretext only" and those that require a plaintiff to meet the higher burden of "pretext plus." As set forth above, the Eighth Circuit does not require a plaintiff to adduce additional evidence of discrimination, and as a result, it cannot be characterized as a "pretext-plus" circuit. The Eighth Circuit, like the "pretext-only" circuits, holds that a plaintiff may make a submissible case by proving the elements of the *prima facie* case, along with evidence of pretext. *Rythe*r, *supra*, 108 F.3d at 837. The Eighth Circuit has only refined its analysis by noting, consistent with *Hicks*, that the evidence may not be inconsistent with a finding of discrimination.

The instant case was decided by the Eighth Circuit using the standards set forth in *Rythe*r. Thus, the Court used a standard that is for all practical purposes the lower "pretext-only" standard. The resolution of any conflict among the circuits will not affect the ultimate decision in this matter. Feltmann's request that this Court correct any conflict is no more than a request for an advisory opinion. The federal courts, including this Court, have no jurisdiction to enter advisory opinions. *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439; 113 S.Ct. 2173, 2178 (1993); *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 784 (7th Cir. 1994).

D. Feltmann Failed To Make A Submissible Case Of Discrimination

Feltmann claims that the Eighth Circuit used the wrong standard of review in reviewing the evidence. Feltmann claims that the appellate court was required to assume all facts in her favor were true, resolve all conflicts in her favor, and give her the benefit of all reasonable inferences. (Petition, p. 18). The Eighth Circuit used *exactly* this standard in reviewing the evidence. The Court stated the standard as follows:

> We must consider the evidence in the light most favorable to Feltmann, assume that all conflicts were resolved in her favor, give her the benefit of all reasonable inferences, and then deny the motion for JAML if reasonable persons could differ regarding the conclusions to be drawn from that evidence.

(Pt.App., p. 7a).

Feltmann's complaint is, in reality, a complaint that the Eighth Circuit disagreed with her assertion that she had made a submissible case. This Court does not exercise its jurisdiction to review the sufficiency of evidence in such circumstances. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 125 L.Ed.2d 168, 191 (1993); *U.S. v. Johnston*, 268 U.S. 220, 227 (1925); S.Ct.R. 10.

Moreover, Feltmann failed to make a submissible case. Feltmann adduced no evidence of comments on the part of Rich or of any of the decision-makers that were indicative of gender discrimination. Feltmann's pretext evidence consisted solely of purported evidence that she was allegedly treated differently from similarly situated male sales consultants. As the Eighth Circuit held, "[t]he litany of incidents Feltmann recites, however, fails to support an inference of disparate treatment." (Pt.App., p. 9a).

Because Feltmann failed to adduce any evidence of disparate treatment, Feltmann failed to adduce any evidence of pretext and, as a result, she failed to make a submissible case. Inasmuch as this Court does not exercise its jurisdiction to review evidence, Sieben believes that a discussion of the evidence is not necessary to the ruling on the instant Petition. However, so that the record is accurate, Sieben provides the following discussion of the evidence.

Feltmann claims that she was the only sales consultant who received a memorandum regarding her work ethic. (Petition, p. 20). Rich also talked to Rick Beutel, a male consultant, about his work ethic. (T. 2:84). Feltmann adduced no evidence of any other sales consultants whose work ethic Rich questioned but did not reprimand.

Feltmann claims that she was treated differently when she was reprimanded for her use of a company demonstrator. (Petition, p. 22). However, in November, 1992, by written memorandum, Rich had instructed all sales consultants that use of the demonstrator was restricted to the St. Louis area. (App. 1:97, 1:104, 1:108; T. 2:183-84, 3:98, 3:235-38, 4:29-30, 5:93-94). Even after receiving this memorandum, Feltmann continued to make weekly, 300 mile trips to Marion, Illinois for another five months, to visit her husband. (*Id.*) The male sales consultants' use of the demonstrator was occasional at most, and took place primarily before Rich's November, 1992 memorandum. (T. 2:69-75; 2:255-57; 3:26-27).

Feltmann claims that the guest drive policy was applied differently to her. (Petition, p. 22). Feltmann was only able to specify *one* instance when Rich denied her permission to allow a customer to guest drive after the April 9 memorandum, and there was evidence that Rich denied permission to at least two male sales consultants during that period. (T. 3:259-60, 6:115-16, 6:227-28). Feltmann also claims that she was fired for failing

to log cars, while male sales consultants were not reprimanded for failing to log cars. (Petition, p. 22). However, Rich believed, and *Feltmann admitted, that by not logging cars out or asking for permission, Feltmann was attempting to hide her actions from Rich.* (T. 2:211-12, 3:231, 6:90-91). Because there was no evidence that male sales consultants had failed to log the cars in an attempt to deceive Rich, the male consultants are not similarly situated.

Feltmann cites the fact that she was reprimanded for loaning cars to two customers during a snowstorm as an example of discrimination. (Petition, p. 23). Feltmann admitted that she allowed two people, who claimed that they could not drive their own cars in the snow, to borrow cars from the new car inventory of Plaza Infiniti. (T. 2:86-89, 3:143-44). Loaning cars in this fashion was a violation of dealership policy. (T. 2:68; App. 1:107). Feltmann adduced no evidence of male consultants who lent cars in violation of the policy.

Feltmann claims that she was treated differently because Rich would not allow her to take a four-wheel drive car home during a snowstorm. (Petition, p. 23). However, the male sales consultants asked permission, but Feltmann failed to do so. (T. 2:93-94).

Feltmann claims that she was treated differently because she was placed on probation. (Petition, p. 23). However, Rich put Rick Beutel, Feltmann's male co-worker, on probation for the same reason — declining sales. (T. 2:99-100, 2:249-51)).

Feltmann complains that she was not allowed to attend the Regional Walk-Around Tournament. (Petition, p. 24). However, Rich did not allow any of the male sales consultants who wanted to participate in the tournament to attend. (T. 2:206-8).

Feltmann also claims that she was the only sales consultant who had to pay for sales brochures. (Petition, p. 24). Feltmann was the only person who expressed a desire to furnish her

customers with personal brochures and she failed to prove that male sales consultants were given free brochures.

Feltmann cites other examples of disparate treatment — the switching of a house deal with a male sales consultant, and Schlabach's refusal to approve the switching of tires on a car. (Petition, p. 25). The Eighth Circuit dealt with each of these incidents and held that Sieben had adduced a legitimate, non-discriminatory reason for each of these events, and Feltmann had failed to adduce any evidence demonstrating gender bias. (Pt.App., pp. 9a-10a).

Feltmann claimed that she was forced to swap a house deal with a male sales consultant and that, on one occasion, Rich approved a deal for a male sales consultant while he did not approve such a deal for Feltmann. (Petition, p. 25). However, as the Eighth Circuit notes, these incidents lacked any probative force given the fact that Feltmann, and no other consultant, was given forty-one clients belonging to a sales consultant who left Plaza. (T. 2:177-78, 3:210).

Feltmann also claims, in conclusory fashion, that Rich failed to get off of the phone to sign her paperwork. (Petition, p. 25). The Eighth Circuit found these allegations too vague and conclusory to support a claim of disparate treatment because Feltmann failed to cite specific incidents where this occurred.[8] (Pt.App., p. 11a).

---

[8] Feltmann finds the Eighth Circuit's reliance on *Davenport v. Riverview Gardens School Dist.*, 30 F.3d 940, 945 (8th Cir. 1994) and *Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1311-12 (8th Cir. 1995) to be misplaced. (Petition, p. 19). Feltmann claims that these cases are inapposite because they involve the grant of a motion for summary judgment. In ruling on a motion for summary judgment the court determines the same issue before the appellate court: has the plaintiff adduced sufficient evidence upon which a reasonable jury could find in favor of the plaintiff. Thus, these cases apply.

(Footnote 8 continued on next page)

Feltmann claims that the fact that she was replaced by a male sales consultant at Plaza Infiniti is indicative of sex discrimination. (Petition, p. 25). However, Rich, the manager who discharged Feltmann, hired Feltmann approximately a year and a half earlier. This evidence is compelling evidence that her discharge was for a non-discriminatory reason. *Lowe v. J. B. Hunt Transport, Inc.*, 963 F.2d 173, 174-75 (8th Cir. 1992).

Feltmann also cites evidence that she claims demonstrates that she was discharged for reporting problems with the incentive bonus account for the Summer Momentum program. (Petition, p. 26). Clearly, this evidence fails to establish that Feltmann was discharged because of her gender. To the contrary, if such existed, it would be inconsistent with a finding of gender bias. *See, Rythe*r, *supra*, 108 F.3d 837 n.4.

Feltmann also claims that Rich was "totally" discredited at trial because she claims that certain evidence was inconsistent with his testimony. (Petition, p. 27). Feltmann misses the point. Rich never gave conflicting reasons for Feltmann's discharge. He testified that he discharged Feltmann because she permitted customers to guest drive cars on two occasions, in direct violation of his directives, and he concluded (and Feltmann admitted), that she failed to log the cars in an attempt to deceive Rich. None of the examples cited by Feltmann cast any doubt on Rich's testimony regarding the reason for Feltmann's discharge.

E. Feltmann's Retaliation Claim

Feltmann claims that she was treated differently, and ultimately discharged, because she complained about Anzalone's

---

(Footnote 8 continued)

Further, as discussed *supra*, while Feltmann had some specific incidents of *alleged* disparate treatment (i.e., the application of the guest drive policy), as the Eighth Circuit held, she adduced no evidence of specific incidents regarding her allegations that Rich refused to get off of the telephone to sign her paperwork. (Petition, p. 11a).

remark. (Petition, p. 29). As set forth above, there was no evidence that Feltmann was treated differently from similarly situated employees. The fact that Feltmann was discharged six months after the incident, standing alone, is insufficient to support a claim of retaliation. (Opinion, p. 12a) (citing *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992)). Moreover, the actions of Rich and the Capps were entirely inconsistent with retaliation. Rich was principally responsible for bringing Feltmann's complaint to management's attention. The Capps' concern in dealing with the incident suggests, if anything, that Sieben was willing to confront and rectify Feltmann's harassment claims. (*Id.*) Further, Feltmann herself admitted that the complaint was handled to her satisfaction, and that she had no further problems with Anzalone.

F. Feltmann's Wrongful Discharge Claim

Feltmann asks this Court to grant the Petition for a Writ of Certiorari for the purpose of reviewing the evidence to determine whether she made a submissible case with respect to her wrongful discharge claim. The determination of whether or not Feltmann made a submissible case under state law is not an appropriate subject for this Court's review on certiorari. *Haring v. Prosise*, 462 U.S. 306, 314 n. 8 (1983); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209; 125 L.Ed.2d 168, 191 (1993), S.Ct.R. 10.

CONCLUSION

This case is not an appropriate case for review by this Court. The United States Court of Appeals for the Eighth Circuit correctly stated and applied the law. Moreover, the resolution of any conflicts among the circuit courts will have no bearing upon the outcome of this case. Therefore, Respondent Sieben, Inc., prays this Court to dismiss the Petition for Writ of Certiorari.

Respectfully submitted,

SUSAN NELL ROWE

THE STOLAR PARTNERSHIP
911 Washington Avenue, 7th Floor
St. Louis, Missouri 63101
(314) 231-2800

Counsel of Record for Respondent Sieben, Inc. d/b/a Plaza Motors